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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 365

KALMAN GREENHILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 196a–197a) is not yet reported.

JURISDICTION.

The judgment of the court of appeals was entered on June 29, 1962 (R. 197a). A petition for rehearing (R. 201a–207a) was denied on July 23, 1962 (R. 210a). The petition for a writ of certiorari was filed on August 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution of an officer of a bankrupt corporation for the unlawful transfer of funds

in contemplation of bankruptcy, he was entitled to production of a report by an accountant, prepared at the request of the attorney for the trustee, which had not been filed in the bankruptcy proceedings and which was not shown to be relevant to the criminal charge.

STATUTES INVOLVED

Section 47(a)(10) of the Bankruptcy Act, 11 U.S.C. 75(a)(10), provides:

> (a) Trustees shall * * * (10) furnish such information concerning the estates of which they are trustees and their administration as may be requested by parties in interest; * * *

Section 49 of the Bankruptcy Act, 11 U.S.C. 77, provides:

> The accounts and papers of receivers and trustees shall be open to the inspection of officers and all parties in interest.

STATEMENT

Petitioner was indicted in the United States District Court for the Southern District of New York for making fraudulent transfers in violation of 18 U.S.C. 152. It was charged that, as an officer and agent of the Westco Steel Company, in contemplation of bankruptcy, he made unlawful and fraudulent transfers of certain sums of money to himself individually, to LaSalle Industries, a corporation, and to American Wood Products Company, a corporation (R. 1a–3a). The jury found him guilty on all three counts (R. 137a). He was sentenced to imprisonment for one year and one day on each of the three counts,

the sentences to run concurrently (R. 186a). On appeal (R. 187a), the judgment was affirmed (R. 197a).

Since the petitioner does not attack the sufficiency of the evidence or the court's charge, a brief statement of the evidence will suffice.

1. Petitioner was the principal beneficial owner of LaSalle Industries of New York, which owned American Wood Products and LaSalle Industries of Maine. LaSalle Industries of Maine in turn owned American Bobbin (R. 52a–53a). Petitioner supervised the work of bookkeepers for these companies (R. 22a, 24a).

In 1954 petitioner, through a company called Bobcal, borrowed $100,000 to be used in that company's purchase of the Westco Steel Company of Oakland, California (R. 12a–14a). Bobcal did purchase Westco, merged with it, and the resultant company eventually became the Westco Steel Company of Delaware (R. 46a–50a, 26a–27a, 74a). Before the merger Westco's net worth was $119,000 and the total assets of Bobcal were $1,000; but after the merger the net worth of the combined company was only $2,400, the reduction being due to the fact that Bobcal had liabilities of $117,500 (R. 26a–27a).

In December 1954, in response to a request by Westco's president for funds to pay accounts payable, petitioner indicated there was no money available for that purpose at the time (R. 74a, 75a). In February 1955, after negotiations by petitioner on behalf of Westco, the company acquired a plant in North Hollywood, California, in addition to the one it already had in Oakland (R. 79a). At petitioner's request

most of the plant inventory was sold at a loss in order to keep the company supplied with cash (R. 80a, 98a, 104a). During 1955, as Westco got progressively farther behind in its payments, the suppliers began to curtail its credit and to put the company on a C.O.D. basis (R. 81a).

Petitioner admitted that he had authority to sign Westco Steel Company checks, and had complete charge of its money (R. 52a–53a). An F.B.I. accountant examined Westco Steel Company's books for the period from November 1954 through November 30, 1955, the date of the last entry in the books (R. 25a, 30a). As of November 30, 1955, his recapitulation (Gov. Ex. 177, R. 138a) showed net total loan disbursements by Westco to the petitioner in the amount of $21,298.15; to LaSalle Industries, Inc., of $45,200.78; and to American Wood Products, Inc., of $8,600.00, for a total combined figure of $75,098.93 (R. 30a–31a, 37a, 45a). In November 1955, in speaking to his accountant about Westco, petitioner stated, "If they don't snap this company up, we're going to have to put it into Chapter XI [of the Bankruptcy Act]" (R. 109a). On January 7, 1956, a voluntary petition for an arrangement was filed pursuant to Section 322 of Chapter XI of the Bankruptcy Act, and on March 1, 1956, Westco Steel Company was adjudicated a bankrupt (R. 1a).

2. Several days after the trial began this colloquy occurred (R. 104a–105a):

> Mr. SUGARMAN [defense attorney]: If your Honor please, as your Honor recalls, before the beginning of this trial, I made a motion, an oral motion, demanding the production of the

accountant's report, the balance sheet, profit and loss statement and other reports prepared by the accountant for the trustee in bankruptcy, which is a public record and which, when we saw it, was not available in Oakland, California. I was advised by Mr. Edwards [Assistant United States Attorney], as I told your Honor at that time, that that report was in his possession, and I made a motion demanding the production of that report.

At this time, if your Honor please, I again make that demand.

The COURT. Do you agree that I told you informally that I had denied it, and you ought to put it on the record now? And I deny it.

Mr. SUGARMAN. That is precisely the reason why I am making the motion now, so the record will be clear.

The COURT. You have an exception.

On appeal petitioner claimed that the report was of vital importance and would have shown that Wested's bankruptcy was the result of business ventures. The government in its brief pointed out that petitioner had made no such claim of materiality at the trial and that by failing to make a proper showing, petitioner had deprived the government of the opportunity to establish that the report was a hearsay summary schedule, prepared by an accountant, based upon books in evidence which petitioner had examined prior to trial. After oral argument in the court of appeals (see Pet. 5, fn. 1), the government submitted an affidavit by the attorney for the trustee in bankruptcy (Pet. 5–6) that an accountant had been employed by the trustee

> for the particular purpose of examining the books of account and records of Westco Steel Company during the period particularly between November 26, 1954 to November 30, 1955, with particular reference to the withdrawals and payments made to or for the account of the aforesaid Kalman Greenhill, American Bobbin Company, LaSalle Industries, Inc. of New York and LaSalle Industries, Inc. of Maine.

The affidavit further stated that the report had at no time been filed with the referee in bankruptcy, was for the use of the trustee and his counsel, and that a copy had been voluntarily turned over to the government. The affidavit of attorney W. Scott Barrett (Pet. 6–7) filed by petitioner was to the effect that he was unable to find the accountant's reports and papers in the bankruptcy file of the Westco Steel Company in the United States District Court for the Northern District of California, and that the attorney for the trustee stated that so far as he knew these documents were still in the hands of the United States Attorney in New York. In ruling against petitioner's claim for production of the accountant's papers the court of appeals stated (Pet. App. 2a):

> The trial judge committed no errors in his rulings on evidence and the appellant's requests that an accountant's report be produced. In any event, appellant was not harmed by his lack of the report in question, since apparently it would not have been admissible as evidence, and was based on books which were available to the appellant.

ARGUMENT

At the trial, petitioner made no showing that he was entitled to production of the report of the accountant for the trustee under either Rule 16 or Rule 17 of the Federal Rules of Criminal Procedure; he made no showing that the report, prepared after bankruptcy, could be evidence in the criminal case; he did not even show that it was material or relevant to his defense. He requested production thereof on the ground that it was a public record which "* * * when we saw it, was not available in Oakland, California" (R. 104a). The present claim that the report might have been of aid in petitioner's defense because it might have contained information other than that which appeared in the books of Westco (Pet. 12, ft. 6) is an afterthought. Moreover, the facts produced before the court of appeals in the affidavit of the attorney for the trustee, which petitioner himself quotes (Pet. 6), show that, if petitioner had, in the district court, endeavored to assert that the report was material to the defense, he would not have succeeded. The record before this Court shows that the accountant was hired "for the particular purpose of examining the books of account and records of Westco Steel Company during the period particularly between November 26, 1954 to November 30, 1955". Not only were Westco's books available to petitioner, but his own accountants examined them and made reports therefrom. See, e.g., testimony of accountant Shechtman that at petitioner's request he prepared a balance sheet for Westco Steel Company as of June 30, 1955, which showed a net deficit in capital of $17,295.12

(R. 68a–69a); and testimony of accountant Levison that at petitioner's request he prepared a financial statement for Westco as of September 30, 1955, which showed a minus net worth of $46,313.67 (R. 106a–107a).

In this Court petitioner argues the issue of his right to see the report as if he had made demand therefor in the bankruptcy proceedings under Section 47(a)(10) and Section 49 of the Bankruptcy Act, 11 U.S.C. 75(a) and 77. Whether or not the petitioner would have had a right in the bankruptcy proceeding to see the report is not controlling here.[1] Not every matter which might be material in the bankruptcy would be material with respect to this criminal charge. Petitioner chose to make his demand for production in the criminal case. He does not even claim that the report could have been evidence in the criminal case.[2] In the absence of a showing that the document had some material bearing on his defense, petitioner's request for production was properly refused.

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[1] We think it clear that petitioner would not have had such a right even in the bankruptcy. A trustee in bankruptcy is permitted to employ an attorney and has both the right and the duty to conduct litigation seeking to recover property belonging to the bankrupt estate. The work papers of the attorney and of persons employed by him for the purpose of litigation would not be the "accounts and papers of receivers and trustees" within the purview of Section 49 of the Bankruptcy Act or "information concerning the estates" under Section 47(a)(10). The cases on which petitioner relies involved documents on file in the bankruptcy proceeding.

[2] His reliance on *Ex parte Uppercu*, 239 U.S. 435, is thus misplaced, for that case concerned a litigant's right to see depositions which could "furnish evidence material to the petitioner's case."

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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